

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUSTIN R. PIDOT  
1201 E Speedway Blvd  
Tucson, AZ 85721

Plaintiff,

v.

U.S. DEPARTMENT OF THE INTERIOR  
1849 C Street NW  
Washington, DC 20240

Defendant.

Civil Action No. 1:19-cv-03090

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. This case arises from a failure of the U.S. Department of the Interior (“Department” or “Defendant”), and its component the U.S. Bureau of Land Management (“BLM”), to produce records requested under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. On October 22, 2018, to further his academic research, Plaintiff Justin R. Pidot submitted two requests to the Department (the “Requests”) for records related to high-profile and controversial actions of the Department: 1) Secretarial Order 3368 (Exh. A), addressing settlements and consent decrees (the “SO 3368 Request,” Exh. B), and 2) BLM Instruction Memorandum 2018-93 (Exh. C), addressing compensatory mitigation on public lands (the “IM 2018-93 Request,” Exh. D). FOIA requires federal agencies to respond to requests for agency records within 20 working days. Yet 245 working days have now passed since Plaintiff submitted the Requests, and Defendant has not produced records, notified Plaintiff that it is withholding records pursuant to 5 U.S.C. § 552(b), or indicated that it has no responsive records.

2. On May 24, 2018, the Department adopted a policy to implement an “awareness process” to allow political appointees within the Department to review records that include their names before such records will be released pursuant to FOIA. Among the records sought in the Requests are records authored by, and provided to, the political leadership of the Department and the BLM, and therefore subject to the Department’s “awareness process.” FOIA mandates release of federal records irrespective of the preferences of political leadership or policy considerations; records may be withheld only based on the specific, enumerated exemptions in 5 U.S.C. § 552(b). Policy considerations and the personal preferences of political leadership are not lawful justifications for delaying the release of records responsive to the Requests.

### **JURISDICTION AND VENUE**

3. The lawsuit is brought pursuant to 5 U.S.C. § 552(a)(4)(B). That provision vests this Court with subject matter jurisdiction, waives sovereign immunity—because the complaint seeks injunctive relief against a federal agency—and establishes that venue is proper in this Court.

### **PARTIES**

4. Plaintiff is a Professor at the University of Arizona James E. Rogers College of Law and Co-Director of its Environmental Law Program. At the time he submitted the Requests, Plaintiff was a Professor of Law at the University of Denver Sturm College of Law. Plaintiff’s teaching and scholarship addresses environmental law, public land law, administrative law, and related topics. He has published articles directly related to the Requests. *See* Justin R. Pidot, *The Bureau of Land Management’s Infirm Compensatory Mitigation Policy*, 30 FORDHAM ENVTL. L. REV. 1 (2018); Courtney McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENVTL. L. REV. 191 (2015). Plaintiff has publicly criticized the BLM’s compensatory mitigation policy, which is the subject of the IM 2018-93 Request. *See* Justin

Pidot, *Interior Department will no longer require industry to offset damage to public lands*, THE HILL, July 26, 2018. Plaintiff also has been critical of a proposed rule issued by the Department to amend its regulations implementing FOIA. *See* Justin Pidot, *Guest Blogger: Interior Proposes New FOIA Rule that Inhibits Government Transparency*, LEGALPLANET BLOG (Jan. 17, 2019).

5. Defendant is an “agency” within the meaning of 5 U.S.C. § 551(1). Defendant has possession and control over records responsive to the Requests.

## STATEMENT OF FACTS

### **SO 3368 Request**

6. On October 22, 2018, Plaintiff submitted the SO 3368 Request to the Office of the Secretary of the Department seeking records related to Secretarial Order 3368, signed by then-Deputy Secretary (now Secretary) of the Interior David Bernhardt on September 11, 2018. Secretarial Order 3368 is titled “Promoting Transparency and Accountability in Consent Decrees and Settlement Agreements.” The SO 3368 Request seeks:

All records created between January 20, 2016 and September 11, 2018 and authored by the Secretary, Deputy Secretary, Assistant Secretaries, Solicitor, and Bureau Directors, and their immediate staff, or created by any department employee for use by the Secretary, Deputy Secretary, Assistant Secretaries, Solicitor, and Bureau Directors, addressing the subjects of Secretarial Order 3368, specifically the relationship between settlements and consent decrees and 1) costs, 2) transparency) and 3) the conversion of “a mandatory duty the otherwise discretionary authority of the” Department of the Interior. This request does not include records related to specific settlements or consent decrees or efforts to negotiate specific settlements or consent decrees.

All records created between January 20, 2016 and September 11, 2018 between the Secretary, Deputy Secretary, Assistant Secretaries, Solicitor, Bureau Directors, Deputy Bureau Directors, the immediate staff of those identified individuals, and persons outside of the Department of the Interior, about the Department’s settlement practices, not including records related to negotiating specific settlements or consent decrees with parties to litigation. Suggested search terms include “sue and settle,” “consent decrees,” “settlements,” “equal access to justice act,” and “EAJA.”

7. The SO 3368 Request reasonably describes the records it requests, and Defendant has never sought clarification or additional information from Plaintiff.

8. The SO 3368 Request seeks a waiver of fees because disclosure of records is in the public interest “because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

9. On October 31, 2018, Plaintiff received a letter via email (Exh. E) from Clarice Julka, FOIA Officer, Office of the Secretary of the Interior, acknowledging receipt of the SO 3368 Request and the request for a waiver of fees and assigning the SO 3368 Request control number OS-2019-00099. The letter classified Plaintiff as an “Education Institution” requester for purposes of assessing fees should the fee waiver be denied.

10. On July 25, 2019, Plaintiff sent Ms. Julka an email inquiring about the status of the SO 3368 Request and updating the Department on his change in institutional affiliation and contact information.

11. On July 26, 2019, Plaintiff received an email from Ms. Julka (Exh. F) stating: “We are still searching for responsive records. Once we receive the records and your requests is the next in the queue, we will start processing.”

**IM 2018-93 Request**

12. On October 22, 2018, Plaintiff submitted the IM 2018-93 Request to the Office of the Secretary and the BLM seeking records related to BLM Instruction Memorandum 2018-93, which was issued on July 24, 2018, and entitled “Compensatory Mitigation.” The IM 2018-93 Request seeks:

All records relied upon by Bureau of Land Management (BLM) Deputy Director Brian Steed in issuing Instruction Memorandum 2018-093, subject “Compensatory Mitigation,” on July 24, 2018.

All records created between January 20, 2017 and July 24, 2018 that constitute correspondence between the Secretary, Deputy Secretary, Assistant Secretaries, Solicitor, Bureau Directors, Deputy Bureau Directors, the immediate staff of those identified individuals, and persons outside of the Department of the Interior, related to the BLM’s mitigation policies, excluding correspondence about specific mitigation requirements imposed or considered for specific land use approvals or resource management plans. A search using the term “mitigation” is sufficient to satisfy this request.

All records created since July 24, 2018 (1) addressing implementation of Instruction Memorandum 2018-093 and (2) either addressed to, or authored by, staff or leadership in the BLM headquarters office, or the Department of the Interior’s Secretary, Deputy Secretary, Assistant Secretaries, Solicitor, and Deputy Solicitors, and the immediate staff of those identified individuals. Suggested search term: “mitigation.”

13. The IM 2018-93 Request reasonably describes the records being requested, and Defendant has never sought clarification or additional information from Plaintiff.

14. The IM 2018-93 Request seeks a waiver of fees because disclosure of records is in the public interest “because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

15. On October 23, 2018, Plaintiff received an unsigned letter via email (Exh. G) from the address mareid@blm.gov, which letter acknowledged receipt of the IM 2018-93 Request and assigned it control number 2019-00078. The letter did not classify Plaintiff as an “Educational Institution” requester, but rather as an “Other” requester.

16. On July 25, 2019, Plaintiff sent an email to maried@blm.gov (Exh. H) inquiring into the status of the IM 2018-93 Request and updating the Department on his change in institutional affiliation and contact information. He has received no response to the e-mail.

### FOIA CAUSE OF ACTION

17. Plaintiff re-alleges and incorporates by reference all allegations set forth above.

18. FOIA directs federal agencies to “make . . . records promptly available to any person” submitting a FOIA request. 5 U.S.C. § 552(a)(3)(A). Once an agency receives a FOIA request, it must respond within 20 working days. *Id.* § 552(a)(6)(A)(i). Agencies may withhold responsive records only by invoking statutorily enumerated exemptions, which “are to be narrowly construed.” *FBI v. Abramson*, 465 U.S. 615, 630 (1982). If an agency determines that it can withhold documents pursuant to one of the enumerated exceptions, it must notify the requester of that determination within 20 working days of that determination and provide notice of the requester’s right to appeal. 5 U.S.C. § 552(a)(6)(A)(i).

19. The SO 3368 Request and IM 2018-93 Request comply with FOIA and the Department’s implementing regulations, *see* 43 C.F.R. § 2.1 *et seq.*, and the Requests “reasonably describe the records sought.” *Id.* § 2.5(a). Defendant has never asked Plaintiff for clarification of the Requests or sought additional information from him. *See id.* § 2.5(d).

20. FOIA does not authorize federal agencies to deny requests or delay the production of records because political leaders would prefer records to remain secret. Such politicization of FOIA runs directly counter to its “basic purpose . . . to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

21. Certain records responsive to the Requests are or were subject to the Department’s awareness process (Exh. I) and updated awareness process (Exh. J). The awareness process and updated awareness process are arbitrary, capricious, and contrary to FOIA and its implementing regulations, which “raise[s] questions whether agency personnel acted arbitrarily or capriciously

with respect to” one or both of the Requests. 5 U.S.C. § 552(a)(4)(F)(i). In particular, “Department employees who are” or were “Presidentially Appointed, Senate Confirmed (PAS), Non-Career Senior Executive (NCSE), and/or Schedule C employees,” Exh. J, at 2, and whose names appear in responsive records, may have improperly influenced the timing and nature of Defendant’s responses (or lack thereof) to the Requests.

22. Defendant has violated FOIA by failing to provide Plaintiff with a final response to the Requests within 20 working days. In the 245 working days that have lapsed since the Requests were filed, Defendant has neither produced any records nor asserted that an exemption applies to justify withholding responsive records. Indeed, on July 26, 2019, more than 180 working days after receiving the Requests, the Department indicated that it had not even begun to process records responsive to the SO 3368 Request. Defendant also completely ignored Plaintiff’s inquiry about the status of the overdue response to the IM 2018-93 Request.

23. Defendant incorrectly categorized Plaintiff in its acknowledgment to the IM 2018-93 Request as an “Other” requester. Rather, as Defendant correctly determined in response to the SO 3368 Request, Plaintiff is an “Educational Institution” requester, because he is a faculty member at an educational institution whose request is made for the purpose of “scholarly or scientific research.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Because Plaintiff is not an “Other” requester, under no circumstances may the Department charge fees for searching for responsive records, and because the Defendant failed to comply with the statutory deadlines established by FOIA, no fee may be assessed. *See id.* § 522(a)(4)(A)(viii); 43 C.F.R. § 2.37(f). In any event, Plaintiff is entitled to a waiver of fees because disclosure of the requested documents is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 522(a)(4)(A)(iii).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully asks that this Court:

- 1) Declare that Defendant has violated and continues to violate FOIA by failing to disclose records responsive to Plaintiff's Requests;
- 2) Order Defendant to promptly make all records responsive to the Requests available to Plaintiff without charge or fee;
- 3) Find that the circumstances surrounding Defendant's responses to the Requests raise questions whether agency personnel acted arbitrarily or capriciously with respect to the timing and nature of those responses;
- 4) Award Plaintiff costs and reasonable attorney fees under 5 U.S.C. § 552(a)(4);  
and
- 5) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ Matthew Littleton

Matthew Littleton

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Dated: October 15, 2019